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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. MICHAEL EUGENE VICKREY, Petitioner.	2 CA-CR 2011-0318-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200800470

Honorable Robert C. Brown, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

James P. Walsh, Pinal County Attorney
By Jason Holmberg
Florence
Attorneys for Respondent

Michael Vickrey
Florence
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Michael Vickrey was convicted after a jury trial of child molestation and sexual conduct with a minor and sentenced to consecutive prison terms of eleven and twenty years respectively. This court affirmed the convictions and the

sentences on appeal. *State v. Vickrey*, No. 2 CA-CR 2009-0328 (memorandum decision filed June 11, 2010). Vickrey sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., which the trial court denied. This petition for review followed. Absent a clear abuse by the trial court of its discretion to decide whether post-conviction relief is warranted, we will not disturb its ruling. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 Appointed counsel filed a notice stating she had found no colorable claim to raise in the post-conviction proceeding. In his pro se petition that followed, Vickrey challenged the convictions and sentences, arguing that consecutive terms were improper because he had committed one act and that he should have been convicted only of child molestation because "the molestation charge (count 1) in this case makes the sexual conduct charge a lesser included offense to molestation." *See* A.R.S. § 13-116 (prohibiting double punishment, including consecutive prison terms, for one act made punishable by different statutes). Vickrey asserted he could not have committed child molestation without also committing sexual conduct with a minor. He also argued A.R.S. § 13-705(M)[1] precluded the trial court from imposing consecutive prison terms when the acts involved one victim.

¶3 Rule 32.2(a)(3) provides in relevant part that "[a] defendant shall be precluded from relief under this rule based upon any ground . . . waived . . . on appeal."

[1]Vickrey refers to the sentencing statute as it was renumbered by 2008 Ariz. Sess. Laws, ch. 301, §§ 17, 29. Because the relevant portions of the law have not materially changed since he committed his offenses in December 2007, *see* 2007 Ariz. Sess. Laws, ch. 248, § 2, we, too, refer to the current version of the statute.

The trial court correctly found precluded the sentencing claims Vickery raised because they could have been raised on appeal. Indeed, Vickrey challenged the sentence on count two on appeal, arguing the trial court should have sentenced him to a mitigated prison term rather than the presumptive, twenty-year term. *Vickrey*, No. 2 CA-CR 2009-0328, ¶ 12. Thus, although he could have challenged the propriety of the consecutive terms as well, he failed to do so. On review Vickrey has not argued, much less persuaded us, that the court erred in finding the claims raised in the pro se petition precluded.

¶4 Although the trial court was not required to address the merits of Vickrey's petition, it did so in any event. The court found Vickrey had committed more than one act, distinguishing *State v. Ortega*, 220 Ariz. 320, 206 P.3d 769 (App. 2008), which Vickrey had relied on in his petition. The court also rejected Vickrey's argument that consecutive terms were improper based on § 13-705(M). The court was correct. The two charges alleged in the indictment, child molestation and sexual conduct with a minor, were based on two entirely independent, separate acts, albeit acts committed on one occasion in December 2007. Even assuming the two acts occurred simultaneously, count one was based on Vickrey having had the victim fondle his penis and count two was based on his having digitally penetrated the victim's vagina. Although § 13-705(M) allows concurrent sentences for child molestation or sexual abuse under certain circumstances, this provision requires the imposition of consecutive prison terms when the defendant has committed child molestation or sexual abuse together with "any other dangerous crime against children," which is what occurred here. *See State v.*

Tsinnijinnie, 206 Ariz. 477, ¶¶ 11, 13, 80 P.3d 284, 286 (App. 2003) (analyzing materially identical language of former A.R.S. § 13-604.01(K)).

¶5 In *Ortega*, the defendant had penetrated the victim's vulva with his penis and that act served as the basis for a charge of sexual conduct with a minor. 220 Ariz. 320, ¶¶ 3, 5, 27, 206 P.3d at 771, 772, 778. But the penetration itself, rather than a separate touching, was also the basis for a molestation charge. *Id.* Thus, the court concluded the defendant could not receive two convictions based on the same act because it would result in his conviction for both the greater and lesser offense. *Id.* ¶¶ 24-25. Here, however, as we previously stated, Vickrey committed two separate acts. The trial court did not err when it initially imposed the sentence nor has Vickrey established the court misinterpreted or misapplied the law, thereby abusing its discretion, when it denied his petition for post-conviction relief. *See State v. Burgett*, 226 Ariz. 85, ¶ 1, 244 P.3d 89, 90 (App. 2010) (noting "abuse of discretion includes an error of law"). We, therefore, grant the petition for review but deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge